

MEMORANDUM OF LAW

DATE: September 24, 1991

TO: Harold Bailey, Management Assistant, Water Reclamation,
Clean Water Program

FROM: City Attorney

SUBJECT: Document Access and Retention

By memorandum dated June 24, 1991, addressed to Chief Deputy City Attorney Ted Bromfield, you asked several questions regarding document access and retention in the Clean Water Program. Below we answer those questions in order presented.

1. What documents or information can the public have access to?

The California Public Records Act (Government Code Section 6250 et seq.) provides that the public is entitled access to "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Government Code Section 6252(d). A "local agency" is defined to include a "city, whether general law or chartered" as well as a "district." Government Code Section 6252(b).

Those records which must be available for public inspection are all "writings," which include:

Handwriting, typewriting, printing, photo-stating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums and other documents.

Government Code Section 6252(e).

From this exhaustive definition of "public record," which would appear to require disclosure of just about anything prepared, owned, used, or held by a public agency, there are twenty-two exemptions. Those exemptions are contained in Government Code Section 6254. Rather than listing all of them here, for purposes of this discussion we list only those which are likely to be most relevant to the Clean Water Program. Where particular questions may arise, we advise that they be directed to us in order that more precise and detailed analyses can be given in light

of specific facts presented. Generally, however, here are pertinent parts of some exemptions excerpted from section 6254:

- (a) Preliminary drafts, notes, or inter-agency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure.
- (b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.
- (c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
- (d) Contained in or related to:
 - (1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.
 - (2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).
 - (3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).
 - (4) Information received in confidence by any state agency referred to in paragraph (1).
- (e) Geological and geophysical data, plant production data, and similar information relating to utility systems development . . . which are obtained in confidence from any person.
- (g) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment, or academic examination
- (h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained.

However, the law of eminent domain shall not be affected by this provision.

(i) Information required from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

It is very important to note that these exemptions apply in the most limited sense. If non-exempt materials are not inextricably intertwined with exempt material and are reasonably segregable therefrom, segregation is required to serve the public disclosure and inspection objectives of the Public Records Act unless a particular statute makes them exempt. *Braun v. City of Taft*, 154 Cal. App. 3d 332, 334 (1984).

Another very important consideration regarding exemptions from the Public Records Act is the requirement of clear justification. Government Code section 6255 provides:

The agency shall justify withholding any record by demonstrating that the record in question is exempt under the express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

Section 6255 provides for residual statutory exemption in addition to the express exemptions, but under its terms all claims of exemption must be solidly justified. Justification involves a balancing of interests (public interest in disclosure v. public interest in nondisclosure), and demands a clear overbalance on the side of confidentiality. *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 657 (1974).

Again we emphasize that the foregoing response with its citation of provisions of the Public Records Act is intended as a general response to your general question. It would be very difficult to hypothesize, for purposes of this explanation, every factual situation where the Public Records Act is implicated and how it would apply to those situations. So please use this advice for basic guidance only, and refer specific factual questions to us for more particular consideration.

2. By filling out a California Public Records Act request, can a member of the public have access to:
 - a. deliverables by a consultant/contractor (e.g. design submittals at 30%/60%/90% complete)?

Yes. Although such deliverables might be viewed as "preliminary drafts" for purposes of Section 6254(a), they should usually be

retained in the regular course of business and thus they do not come within that Public Records Act exemption. Further, it is doubtful that the public interest in withholding such records clearly outweighs the public interest in disclosure. However, another exemption may apply where the deliverables involve geological data, plant production data, and similar information related to utilities systems development if that data was obtained in confidence. Government Code Section 6254(e).

b. working drawings and documents (e.g., internal project files, memos)?

Yes. Working drawings used for actual implementation of design are public records subject to disclosure insofar as they are not "preliminary drafts." With respect to project files and memos, these too are public records outside any exemption unless they are not routinely retained for some good and justified reason which outweighs any public interest disclosure.

However, those documents which are prepared for the City Attorney's office to assist in responding to the litigation in U.S.A. v. City are generally exempt under Section 6254(k), as these documents are exempted by other provisions of law relating to privileged attorney-client communications ¶California Evidence Code Section 954; Federal Rules of Evidence Section 501σ, and the attorney's work product privilege ¶California Code of Civil Procedure Section 2018; Federal Rules of Civil Procedure, Rule 26(b)(3)σ. Such documents believed by this office to be privileged will generally be so stamped.

c. contracts with actual dollar amounts, and invoices against these contracts?

Yes. Awarded contracts and all expenditures authorized or paid therefore are almost always matters of public record. The exceptions might be where geological or geophysical data are involved after having been obtained in confidence (Section 6254(e)), and where litigation or a claim is pending (Section 6254(b)).

d. change orders (requested and approved)?

Yes. These are public records subject to disclosure unless they are the subject of litigation (Section 6254(b)).

e. right of way information and property transferred in?

Yes. All writings pertinent to established public property rights are matters of public record and must be available for public inspection. Moreover, property rights should be on public record in the office of the County Recorder.

3. Is there a City policy for length of retention of documents/drawings/information/change orders or other design and construction related documents?

Yes, but before turning to the City's laws and policies it is helpful

to first consider state law. The City is permitted by Government Code Section 34090 to adopt resolutions, approved by the City Attorney, calling for the destruction of any record or document which is no longer required, without first making a copy; however, such resolutions may not be adopted with respect to certain records as follows:

- a) Records affecting the title to real property
- b) Court records
- c) Records required to be kept by statute
- d) Records less than two years old
- e) The minutes, ordinances, or resolutions of the legislative body or of a city board or commission

Of most significance to your inquiry is Government Code Section 34090(d), which basically requires that all City records be retained for at least two years. Also significant is Section 34090(c), pertaining to records which are required to be kept by statute. For an example on this point, please see the answer to Question No. 7, below.

From these minimum requirements, the City of San Diego, through its City Council, has adopted Procedures Governing Management of City Records ("Procedures"), found at San Diego Municipal Code ("SDMC") San Diego Municipal Code Section 22.2601 et seq., a copy of which is attached for reference. The Procedures require each department head to prepare a Records Disposition Schedule in consultation with the Records Management Officer of the City Clerk's office. SDMC Section 22.2605.

The Clean Water Program is presently a division of the Water Utilities Department. Water Utilities has prepared a Records Disposition Schedule for its other divisions but not for the Clean Water Program. Accordingly, the Water Utilities Director is responsible for updating his department's Disposition Schedule to include the Clean Water Program. The development of a Records Disposition Schedule for the Clean Water Program should be accomplished in consultation with the Records Management Officer and may closely parallel the schedules for other Water Utilities Divisions. With respect to record destruction, we reference SDMC Section 22.2607 and direct your attention to the attached text. There must be compliance with that ordinance before any records are destroyed. The ordinance presumes an established Records Disposition Schedule.

4. Must the original hard copy be retained or is an electronic image acceptable as an original document?

To answer this question we cite Government Code Section 34090.5, which permits the city officer having custody of public records to destroy them, without the permission of the City Council or City Attorney, if all of the following conditions are met:

- (a) The record, paper, or document is photographed, microphotographed, reproduced by electronically recorded video images on magnetic surfaces, recorded in the

electronic data-processing system, recorded on optical disk, reproduced by any other medium which does not permit additions, deletions or changes to the original document, or reproduced on film, optical disk, or any other medium of a type approved for permanent records by the National Institute of Standards and Technology.

(b) The device used to reproduce the record, paper, or document on film, optical disk, or any other medium is one which accurately and legibly reproduces the original thereof in all details and which does not permit additions, deletions, or changes to the original document images.

(c) The photographs, microphotographs, or other reproductions on film, optical disk, or any other medium are made as accessible for public reference as the original records were.

(d) A true copy of archival quality of the film, optical disk, or any other medium reproductions shall be kept in a safe and separate place for security purposes.

However, no page of any record, paper, or document shall be destroyed if any page cannot be reproduced on film with full legibility. Every unreproducible page shall be permanently preserved in a manner that will afford easy reference.

For the purposes of this section, every reproduction shall be deemed to be an original record and a transcript, exemplification, or certified copy of any reproduction shall be deemed to be a transcript, exemplification, or certified copy, as the case may be, of the original.

Government Code Section 34090.5

5. If there is a claim dispute pending, how long must the documents be retained?

At least until the claim has been finally adjudicated or otherwise settled. Subsequently the Disposition Schedule should be consulted. Also, remember that if the claim is being litigated, or if the claim has been formally made according to sections 810 et seq. of the Government Code, documents concerning it are not public records subject to disclosure. Government Code Section 6254(b).

6. If and when the Clean Water Program is assumed by a Special Act District, will there be any difference in document access and retention requirements?

No. A wastewater district is still a "local agency" for purposes of the Public Records Act. Government Code Section 6252(b). Therefore, the legal requirements for public access to documents will be identical to

those which presently apply to the City. It is further recommended that the City's Record Disposition Schedule be adopted by the district for reasons of facility and continuity.

7. How long must original contracts and any change orders thereto be retained?

Not less than two years per Government Code Section 34090(d), and beyond that, whatever period is established in the Records Disposition Schedule per SDMC Sections 22.2605 and 22.2607 (see answer to Question No. 3 above). Also, it is important to note that public works contracts - i.e. construction contracts - are matters of permanent public record in that the City (or district) engineer is required to file with the County Clerk, or keep on file in his own office, information relating to the contract within sixty (60) days of its completion. This information must include full and accurate plans and specifications, names of bidders with prices bid, any approved changes in the plans or work authorizations, a statement whether the work was satisfactorily completed, and the cost breakdown of the work. Government Code Section 4005. All of this information is open to inspection and examination as a public record. Government Code Section 4006.

8. How long must redbooks (engineer's calculations) be retained?

See answer to Question No. 7, above.

9. How long must redlines (changes and comments to drawings and schedules) be retained?

See answer to Question No. 7, above.

10. What information, if any, from subcontractor/consultant files be retained and for how long?

This question is probably most germane to files of subconsultants, as subcontractors on construction works are not involved in design, engineering, or management. For subcontractors on public works, documents would likely include certificates of materials used and inspection approval documents. For subconsultants, all working documents become the property of the City per standard contract provisions with the principal consultant. Disposition of such records should be in accordance with the answer to Question No. 7, above.

11. Can the Clean Water Program maintain "CONFIDENTIAL" files with limited access, even to Consultant and City employees?

No, unless certain writings come within the exemptions to the disclosure requirements of the Public Records Act. These are set forth at Government Code Section 6254. See answer to Question Nos. 1 and 2, above. In addition to the attorney-client and work product privileges discussed in the answer to Question No. 2, Evidence Code Section 1040 also establishes a category of documents exempted from disclosure under Government Code Section 6254(k). Evidence Code Section 1040 provides that a governmental privilege applies to evidence of official information if disclosure is against the public's interest. The privilege is applied

conditionally on a clear showing that the disclosure is against the public's interest. See *People v. Superior Court*, 19 Cal. App. 3d 522 (1971). (Records of public entity's contacts with undercover informers.)

12. Should access to the proposed Program Plan Room be unrestricted or limited to consultants and subcontractors working on that particular project, or any portion of the program?

The answer is one involving administrative policy, and we thus defer to your own judgment. We do caution however, that if there are documents in the Plan Room which are required to be made available for public inspection by the Public Records Act, as almost certainly will be the case, then you must permit public inspection of those records upon a timely demand. Of course, this does not mean that the inspection must be allowed in the Plan Room itself, but only that there be a procedure in place to accommodate requests to inspect those public records.

Hopefully this general explanation will be a useful guide for developing records management policies in the Clean Water Program. The main point we wish to emphasize is contained in our answer to your Question No. 3, and that is the development of a Records Disposition Schedule for the Clean Water Program. If you have any further questions on the topic of document access and retention, we will be pleased to address them.

JOHN W. WITT, City Attorney

By

Frederick M. Ortlieb

Deputy City Attorney

FMO:skh:015(x043.2)

Attachment

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